would be imposing an additional penalty of $25,168 on the (appellant)" but nonetheless came to the conclusion that an order of forfeiture would not "create an additional excessive overall penalty." He arrived at that conclusion because the appellant was a person who had "(bought) an expensive sports car but has no regard for the safety of others" and had no reason to drive it rashly and thereby putting the life and safety of other road users at jeopardy.

In my judgment that reason may well be a proper reason for disqualifying the appellant from driving motor vehicles but not a proper reason for ordering forfeiture of the car in question and in all the circumstances of the case I am of the opinion that the order of forfeiture should not have been made.

There remains the question as to whom the motor car in question should be ordered to be delivered to. On the undisputed evidence adduced by Orient Consumers Credit Pte. Ltd. that it had duly terminated the Hire-Purchase Agreement and therefore had the right to possession of the motor car I am of the opinion that the proper order to be made under the provisions of section 385(2) of the Criminal Procedure Code is that the motor car No. EQ7967R be delivered to Orient Consumers Credit Pte. Ltd.

Order accordingly.

Solicitors: *Amarjit Rubin & Partners; Michael B.B. Ong & Co.*

TAY TUAN KIAT & ANOR. v. PRITAM SINGH BRAR

[O.C.J. (Thean J.) July 10, 1986]

[Singapore – Suit No. 3552 of 1977]

Tort – Trespass – Adjoining property – Retaining wall and structure encroaching on plaintiffs' land – Whether cause of action is barred by Limitation Act – Defence of laches – Mandatory injunction – Nominal damages – Limitation Act (Cap.10), ss. 6 & 12.

Limitation – Doctrine of laches – Trespass to land – Limitation Act (Cap.10), ss. 6 & 12.

The plaintiffs are the owners of the property at 18, First Avenue, Singapore. The defendant is the owner and occupier of the adjoining property at No. 15, Second Avenue, Singapore. The plaintiffs' house faces the First Avenue and the defendant's house faces the Second Avenue and they share a common boundary at the back of the respective houses. Before the defendant purchased the property there was no retaining wall except a small white inlet wall. There was however a fence separating the two houses and next to the fence there were a hedge and lalang. Immediately or soon after his purchase (on March 7, 1967) the defendant removed the fence, hedge and lalang separating the two properties and built a retaining wall in their place. The bottom of the retaining wall rested on the plaintiffs' property. There was also a structure built on the defendant's premises which encroached on the plaintiffs' property. In 1974 the plaintiffs discovered these encroachments and in 1975 they requested the defendant to remove the wall and structure. The defendant, however, took no action.

On December 5, 1977 the plaintiffs' took out a writ against the defendant. They pleaded that the defendant had wrongfully built the retaining wall on the plaintiffs' land and thereby trespassed on the plaintiffs land and wrongfully remained in possession of the portion of the land occupied by the retaining wall and the plaintiffs have thereby been deprived of the use and enjoyment of the said portion of the land. The defendant claimed that the plaintiffs' action is barred by the Limitation Act. His counsel submitted that the claim of the plaintiffs was for damages for trespass and not for recovery of possession of their property and the relevant period of limitation was 6 years from the date the cause of action accrued. The defence of laches was also raised by the defendant. There was, however, no dispute as to the fact that the retaining wall encroached on the plaintiffs' land.

Held: (1) the limitation period is 12 years under section 9 of the Limitation Act and not 6 years. Even assuming that the claim is for damages for trespass, it has still not been time-barred; the trespass complained of is that caused by the retaining wall constructed by the defendant on the plaintiffs' property and the wall is still encroaching on their property; in other words the trespass is continuing;

(2) the doctrine of laches is not applicable where, as here, there is an express provision stating the limitation period;

(3) the relief asked for by the plaintiffs, namely that the defendant do pull down and remove the retaining wall and erect a new wall in place thereof but within the boundary of the defendant's land, amounts to a mandatory injunction. In the present circumstances the injunction should not be granted. The defendant should, however, remove the chain-link fence which is at the top of the retaining wall and erect it along the common boundary without encroaching on the plaintiffs' property. The defendant should also remove the structure that encroaches on the plaintiffs' land;

(4) since there is no evidence that the plaintiffs had suffered any damages or loss as a result of the trespass, nominal damages of $500.00 should be awarded to the plaintiffs.

Cases referred to:

(1) *Re Pauling's Settlement Trusts* [1961] 3 All E.R. 713, 735; [1964] Ch. D. 303, 353.

(2) *Redland Bricks Ltd.* v. *Morris & Anor* [1970] A.C. 652, 665.

(3) *Charrington* v. *Simons & Co. Ltd.* [1970] 1 W.L. R. 725.
(4) *Shepherd Homes Ltd.* v. *Sandham* [1971] Ch. D. 340.
(5) *Armstrong* v. *Sheppard & Short Ltd.* [1959] 2 Q.B. 384, 399-400.

CIVIL SUIT.

K. S. Lo for the plaintiffs.
Mohideen Rubin for the defendant.

Cur. Adv. Vult.

Thean J.: The plaintiffs are the owners of the property, Lot 24-18 of Mukim IV with a house thereon known as 18, First Avenue, Singapore. The defendant is the owner and occupier of the adjoining property, Lot 24-231 also of Mukim IV with a house thereon known as No. 15, Second Avenue, Singapore. The plaintiffs' house faces the First Avenue, and the defendant's house faces the Second Avenue, and they share a common boundary ("the common boundary") at the back of the respective houses. The defendant's property is much higher than the plaintiffs' property; the difference in levels of the two properties is about 15 feet.

The plaintiffs' property came to the family a long time ago. The 1st plaintiff's father bought the property in 1936 and conveyed it to the 1st plaintiff's mother in 1941. Subsequently, the mother conveyed the property to the 1st plaintiff in 1955, and in January 1976 the 1st plaintiff conveyed the property to himself and the 2nd plaintiff as joint tenants and since then they have been holding the property as such. The defendant bought his property on March 7, 1967. At that time the defendant's property sloped down steeply towards the plaintiffs' property at or near the common boundary. Separating the two properties was a fence of about 5 feet high at the top of the slope – on the same level as the land on which the defendants' house stands – and next to the fence on the slope were a hedge and lalang. There was no retaining wall at the slope, except a small white inlet wall at the bottom of the slope which was built by the predecessor in title of the defendant. The purpose of this inlet wall was of course to prevent earth on the top from slipping.

Immediately or soon after his purchase, the defendant removed the fence and the hedge and lalang separating the two properties and built a retaining wall in their place. The wall is almost perpendicular, the top of which is on the same level as the land on which stands the defendant's house and along the edge of the retaining wall at the top the defendant erected a chain link fence of about 5 feet high. The bottom of the retaining wall rests on the plaintiffs' property. In 1974 or thereabout, the 1st plaintiff carried out renovation to his house and in the course of such renovation his architect, Lim Kok Cheng (PW 1), found that the retaining wall built by the defendant was standing wholly on the plaintiffs' property. He duly informed the 1st plaintiff, first over the telephone and subsequently by a letter (Exhibit P 9). After receipt of his architect's letter, the 1st plaintiff consulted his solicitors and they wrote a letter dated July 19, 1975 (Exhibit AB 1) to the defendant, complaining that the retaining wall encroached on the plaintiffs' property and requesting it to be removed by August 31, 1975. This was followed by another letter of August 14, 1975 to the defendant, also written by the solicitors for the 1st plaintiff, complaining that the retaining wall was not structurally sound and that a shed or hut erected on the defendant's property also encroached on the plaintiffs' property, and requesting the defendant to remove the shed and to reconstruct a wall in accordance with requirements of the planning authority. No action appeared to have been taken by defendant in response to such requests. About two years later, on July 2, 1977, the plaintiffs' solicitors wrote a further letter to the defendant complaining once again of the encroachment by the retaining wall on the plaintiffs' property and requesting the defendant to remove it within 14 days; the defendant however did not comply with this request. Then on December 5, 1977, the plaintiffs took out a writ against the defendant. In their statement of claim (which was subsequently amended, re-amended and further re-amended) the plaintiffs pleaded that during the period between March 1967 and October 1968, the defendant wrongfully built the retaining wall on the plaintiffs' land and thereby trespassed on the plaintiffs' land and wrongfully remained in possession of the portion of land occupied by the retaining wall and the plaintiffs have thereby been deprived of the use and enjoyment of the said portion of land. They claim for: (i) a declaration that the defendant is and has been in wrongful possession of the plaintiffs' land and has trespassed thereon; (ii) an order that the defendant do forthwith pull down and remove the existing retaining wall and erect a new wall in place thereof but standing within the boundary of the defendant's land, and (iii) damages. The claim is resisted by the defendant and he raised two defences: (i) the claim by the plaintiffs is barred by the Limitation Act, and (ii)

the plaintiffs' claim for relief is also barred by delay amounting to laches in that the plaintiffs did not make any complaint about the retaining wall until July 19, 1975 or thereabout and did not commence any proceeding until December 5, 1977.

It is not in dispute that the defendant had built the retaining wall at or near the slope abutting on the common boundary but on the plaintiffs' property. According to the survey plan (Exhibit P 13) the retaining wall occupies an area of approximately 11.8 sq. m. of the plaintiffs' property. It is also not in dispute that the defendant having built the retaining wall, erected the chain link fence along the edge and on the top of the retaining wall: see Exhibits P8D, P8F and P13; thus the fence also stands on the plaintiffs' property. The defendant also erected a shed or hut on his land at or near one end of the retaining wall and a part of this structure stands on the plaintiffs' property. The defendant therefore has committed acts of trespass on the plaintiffs' property, and the plaintiffs have a claim against him. The question is whether this claim is barred by (i) the Limitation Act and (ii) laches, as pleaded in the defence.

Mr. Rubin for the defendant submitted that the claim of the plaintiffs was for damages for trespass and not for recovery of possession of their property and the relevant period of limitation was that under section 6 of the Limitation Act, which is 6 years from the date the cause of action accrued. As more than 6 years had elapsed since the defendant built the wall encroaching on the plaintiffs' property the claim of the plaintiffs was therefore time-barred. I am unable to accept this argument. The claim by the plaintiffs is in effect for possession of that portion of their property occupied by the retaining wall, though the claim was framed in a somewhat devious way. The plaintiffs did not ask for an order for possession of that portion of their property encroached upon by the retaining wall and the fence. They asked for an order requiring the defendant to demolish the existing retaining wall and rebuild a new wall in place thereof but within the boundary of the defendant's land. Such an order if made and complied with would in effect give to the plaintiffs possession of that portion of their property encroached upon. In my view, the relevant period of limitation is that under section 9 of the Limitation Act, which is 12 years from the date the cause of action accrued. Further, assuming that the claim is only one for damages for trespass, it has still not been time-barred: the trespass complained of is that caused by the retaining wall constructed by the defendant on the plaintiffs' property and the wall is still encroaching on their property; in other words, the trespass is continuing. This defence therefore clearly cannot stand.

As regards the defence of laches, the short answer to it is this: there is an express statutory provision prescribing the period of limitation for the plaintiffs' claim, and in view thereof the doctrine of laches is not applicable: see the judgment of Wilberforce J. (as he then was) in *Re Pauling's Settlement Trusts*[1] which was affirmed on appeal.

Both the defences pleaded and relied upon by the defendant having failed, the next question is what order should be made to satisfy the plaintiffs' claim. The first relief asked for is a declaration that the defendant is and has been in wrongful possession of the plaintiffs' property and has trespassed thereon. In principle there is no objection to making this declaration.

The second relief asked for is an order that the defendant do pull down and remove the retaining wall and erect a new wall in place thereof but within the boundary of the defendant's land. It is in effect a mandatory injunction and the question is whether it should be granted in this case. "The grant of a mandatory injunction is, of course, entirely discretionary and unlike a negative injunction can never be "as of course." Every case must depend essentially upon its own particular circumstances." (per Lord Upjohn in *Redland Bricks Ltd.* v. *Morris and Anor.*[2]). This is a general principle, and I now turn to consider the circumstances of this case. The defendant's house is very near to the common boundary – less than 10 feet away. Before the retaining wall was erected in 1967 there was at or near the common boundary a steep slope towards the plaintiffs' property. No survey was carried out at the time to determine where the common boundary was: whether it was at the top or the bottom or in the middle of the slope. On the slope were a hedge and lalang. The defendant got rid of the hedge and lalang and built an almost perpendicular retaining wall at the slope, and probably it was erected at a position at the bottom of the slope and vertically upwards; and at the top the defendant filled up the land, thus gaining a couple of feet of land or thereabout. To require the defendant now to demolish the existing retaining wall and build a new one wholly within the boundary of his land would in effect result in the plaintiffs gaining an area of about 11.8 sq. m. of land

immediately adjoining the common boundary and on the same level as the land on which their house stands, which is an improvement of their land they never had before the wall was erected.

The back of the defendant's house is less than 10 feet from the common boundary, and if the retaining wall is to be demolished and rebuilt, then it will have to be a vertical retaining wall all along the common boundary with a length of about 100 feet and the cost of such works would be considerable. Dr. Lau (PW 5) estimated that the cost would be about $60,000. That seems to me to be a conservative estimate and probably it would be or could be more than that depending of course on how the works are to be carried out and the materials to be used. Even at $60,000 it is a large sum of money to be expended. The area of the plaintiffs' property encroached upon by the retaining wall is a narrow strip of land of about 11.8 sq. m. and even if the existing retaining wall is demolished and rebuilt all along the boundary but standing on the defendants' property the plaintiffs would gain effectively only this narrow strip of land. The defendant, on the other hand, would have to incur a considerable amount of money, and, in addition, because of the close proximity of the defendant's house to the common boundary, great care would have to be taken by his engineer, contractor and workers in the demolition of the existing wall and construction of the new wall; otherwise his land might slip and his house collapse. In my view, if the mandatory injunction asked for by the plaintiffs is granted the obligation imposed on the defendant is extremely onerous and is out of all proportion to the benefit to be gained by the plaintiffs. In my view, it will not produce a fair result. In *Charrington* v. *Simons & Co. Ltd*[3] the plaintiff complained that the defendants in breach of a negative covenant re-surfaced a tract and raised the level thereof above that of the surrounding land belonging to the plaintiff who was cultivating an orchard on his land. The difference in levels of the track and the surrounding land interfered with or impeded the plaintiff's cultivation on the surrounding land and he brought the action against the defendant seeking, *inter alia*, a mandatory injunction requiring the defendant to remove any part of the track above the level of the surrounding land. Buckley J. who heard the case granted the mandatory injunction but suspending it for 3 years, which suspension, however, was lifted by the Court of Appeal: see [1971] 1 W.L.R. 599. Buckley J. in considering the grant of a mandatory injunction said, at p. 730:

> "Where a mandatory order is sought the court must consider whether in the circumstances as they exist after the breach a mandatory order, and, if so, what kind of mandatory order, will produce a fair result. In this connection the court must, in my judgment, take into consideration amongst other relevant circumstances the benefit which the order will confer on the plaintiff and the detriment which it will cause the defendant. A plaintiff should not, of course, be deprived of relief to which he is justly entitled merely because it will be disadvantageous to the defendant. On the other hand, he should not be permitted to insist on a form of relief which will confer no appreciable benefit on himself and will be materially detrimental to the defendant."

The concept of "fair result" as one of the criteria in determining the grant of a mandatory injunction was accepted by Megarry J. in *Shepherd Homes Ltd* v. *Sandham*[4] where he said, at p. 351:

> "Second, although it may not be possible to state in any comprehensive way the grounds upon which the court will refuse to grant a mandatory injunction in such cases at the trial, they at least include the triviality of the damage to the plaintiff and the existence of a disproportion between the detriment that the injunction would inflict on the defendant and the benefit that it would confer on the plaintiff. The basic concept is that of producing a "fair result", and this involves the exercise of a judicial discretion".

There is one further point which should also be taken into account. The 1st plaintiff denied that the defendant constructed the retaining wall with his permission; he was at that time the sole owner of the property. However, as a matter of practicality the wall could only be built from the bottom upwards and to build such a wall the defendant's contractor and workers must have entered the plaintiffs' property, and, of course, they could only do so with the 1st plaintiff's permission. The defendant could not have constructed the wall only from his land without such entry. It is true that there was no direct evidence before me on this point, but as a matter of inference and common sense, I can arrive at no other conclusion. It seems to me that, if this was the position, as I think it was, then the 1st plaintiff must have either expressly or impliedly permitted or acquiesced in the construction of the wall, though at that time he had no knowledge or was not aware that the wall was being erected solely on his property. It is curious that the defendant did not raise in his defence that the retaining wall was built with the licence of the 1st plaintiff, express or implied; that would have been a defence to the plaintiffs' claim of trespass by the defendant's construction of the wall. In *Armstrong* v. *Sheppard & Short Ltd*[5] at pp. 399-400 Lord Evershed M.R. said:

> "It is, I think, true to say (and these cases establish it) that if A gives authority to B for the doing of an act on A's land, and the act is done and completed, then, whatever be the

strict description of the authority, whether it be called a permission or a licence, it is, generally speaking at any rate, too late for A, who gave the authority, to complain of it. And that will go to this extent – that a man may by such means extinguish a proprietary right: for example (to quote an instance from the cases), if I, having an easement of light, permit another to come and build a wall up against my window so as to extinguish the easement, if the wall is built and completed, that may well be the end of it, and I cannot complain of the infringement of my ancient light or require the wall to be taken down."

In that case the defendant for the purpose of carrying effluent water from the defendant's land to the public sewer constructed a manhole and sewer pipes on the plaintiff's land with the permission of the latter who at that time was not aware that they were constructed on his property. On discovering this subsequently he brought an action against the defendant for trespass claiming for damages and injunction. The trial judge declined to grant an injunction on the ground that the damage was trivial and awarded the plaintiff nominal damages. The trial judge's decision was affirmed by the Court of Appeal. In this case though licence or permission for the construction of the retaining wall was not raised as a defence, it is nevertheless an important factor to be taken into account in considering whether or not the mandatory injunction asked for ought to be granted. In my opinion, having regard to the licence or permission for the construction of the wall by the defendant it would be inequitable to require the demolition thereof and erection of a new wall in its place at great cost and inconvenience to the defendant.

For all these reasons, I am not disposed to grant the mandatory injunction asked for by the plaintiffs. But along the edge and at the top of the retaining wall there is a chain link fence erected by the defendant. This in fact is on the plaintiffs' property. The defendant should remove this fence and re-erect it along the common boundary without encroaching on the plaintiffs' property. There is also a hut or shed at the corner of defendant's property and a part of that structure also encroaches on the plaintiffs' property. He should also demolish this structure. Mr. Rubin at the commencement of his closing speech made a statement at the Bar that the defendant would be prepared to move the chain link fence to the common boundary and to demolish the shed or hut, both of which encroached on the plaintiffs' property. Hence, what I require the defendant to do will not really be too onerous and in effect will give to the plaintiffs possession of that portion of their land which the defendant has been and is presently occupying.

On the question of damages, there is no evidence that the plaintiffs have suffered any damage or loss as a result of the trespass. Before the retaining wall was built by the defendant there was steep slope and the plaintiffs had never had any effective enjoyment of the portion of land on which now stands the wall. Miss Ivy Tay (PW 6) testified that the plaintiffs had lost rental from their property because of the lack of privacy to the tenants staying there. That surely is not because of the retaining wall but because of the fact that both the plaintiffs' house and the defendant's house are too near to the common boundary. On this the 1st plaintiff is partly to blame: in renovating his house in 1974 he extended it towards the common boundary. I therefore award to the plaintiffs only nominal damages in a sum of $500.

I now make the following orders: (1) a declaration in terms of prayer (1) of the Statement of Claim; (2) an order that the defendant remove the existing chain link fence and re-erect it along the common boundary and without encroaching on the plaintiffs' property and demolish the existing hut or shed which encroaches on the plaintiffs' property, and (3) an order that the defendant pay to the plaintiffs a sum of $500 as nominal damages for the trespass.

As for costs, I do not think that the plaintiffs should be allowed the whole of the costs of this action. They have failed in their claim for the substantive relief asked for. Further, the action has been unnecessarily prolonged and in the course of the trial amendments were made to the pleadings, the costs of which I have reserved. In the circumstances, I think a fair order as to costs is that the defendant pay to the plaintiffs only two-thirds of the costs of this action.

Order accordingly.

Solicitors : *Allen & Gledhill; Amarjit Rubin & Partners.*